

United States Court of Appeals For the Ninth Circuit

HARRY JOSEPH, *Appellant*,

vs.

DONOVER COMPANY, INC., a corporation; HARRY J. O'DONNELL; RALEIGH CHINN; KINZUA CORPORATION, a corporation; MARK F. MATHEWSON and RICHARD K. BUSH, Trustees in Dissolution of CAPITAL TIMBER PRODUCTS COMPANY, a corporation; CAPITAL TIMBER PRODUCTS COMPANY, a corporation; ALVIN SCHWAGER; E. W. STUCHELL; D. E. WYMAN; M. H. WYMAN, and
BRYANT R. DUNN, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

APPENDICES TO BRIEF OF APPELLEES

Appendix I — Trial Court's Oral Decision

Appendix II — Trial Court's Findings of Fact, Supported by References to the Record, and Conclusions of Law

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dence was concluded. This particular motion, the memoranda submitted, and the argument have been fully considered. Extensive time and thought have gone into it.

I have concluded, gentlemen, that I am as able now as I ever will be, to decide this matter as well [2126] as I can decide it within my ability and experience. Accordingly, I will do so. I am the more persuaded to do this because, gentlemen, whether right or wrong about it, I have no doubt whatever in my mind what the answer to this problem must be. I mean that the matter seems clear and certain to me even though I hope I am reasonably conscious of my own limitations and of the fact that many of the matters that are presented to me for decision here involve questions to which only the Deity could provide the true answers.

The reconstruction of past events, in the great majority of cases, at least, is not now an exact science nor is it ever likely to be, human nature continuing as it is. All that I can do in this position is to exercise such reason and judgment as I have, in the light of such experience as I have had, on such evidence as has been presented to me. Absolute certainty is an impossibility in this naughty world. The best we can do is to have a moral certainty, a reasonable certainty, which may vary according to the circumstances. In my own mind I have a certainty to that extent on the questions presented to me here which I consider primarily questions of fact. [2127]

I want to make two or three preliminary statements lest there be any misunderstanding. If these parties

had an agreement amounting to a contract resulting in a fiduciary relationship between them, and it was violated by any of the defendants, whether intentionally or not, the Court would be just as indignant at such a breach of faith as the plaintiff's counsel, and I think quicker to grant relief than the plaintiff was to ask for it in this particular case.

Prior to dealing with this case I had never met, nor as a matter of fact, ever even heard of Mr. Joseph or Mr. O'Donnell or Mr. Chinn, or any of the primary actors involved in this controversy. I never heard of them, as I say, and I have no acquaintance whatsoever with any one of them, and thus have made my judgment of the facts and of the credibility of Mr. Joseph, Mr. O'Donnell, Mr. Chinn, and Mr. Terman solely on what I have seen and heard here in the courtroom.

I want to say another general thing about the credibility of the witnesses. Part of the responsibility of a trier of the fact in weighing the credibility of witnesses is to look at them and to listen to them to try to evaluate the kind of people they are, [2128] and to gain some impression from the way they testify and from their appearance and demeanor as to what kind of people they are, how credible they are, and what weight and value should be given to their testimony. Sometimes it happens, gentlemen, that the very forensic defects and inadequacies of a witness will speak more forcefully of his credibility and the meaning of the words he uses than if he were more glib, more positive and certain about the matters concerning which

he gives testimony. I have seen the thing happen with juries time and again. It happens, certainly, with me as an individual. It has happened in this particular case. The very inadequacies of Mr. O'Donnell, as a witness, somehow or other have brought to me a conviction as to his integrity and credibility that might be difficult to understand simply from a reading of the cold record of exactly what he said.

I cannot subscribe to the castigation of Mr. O'Donnell's character and of his testimony that counsel for the plaintiff have given in their briefs and argument, although I am far from resentful of their [making it].* It is their duty to make that contention [if they sincerely] believe the record supports it. I [haven't any doubt] of the professional integrity of [2129] plaintiff's counsel; I just can['t] agree with their view, and I don't agree with it. I must say that Mr. O'Donnell impressed me most favorably. Obviously, he is not a man that speaks glibly and readily. He is a lumberman, familiar with forests and the running of sawmills, but I should gather from hearing his testimony that he is inexperienced as a witness and as a person who is required to formulate his thoughts into precise and exact words, particularly in response to adroit and exhaustive examination by adverse counsel.

Apropos plaintiff's contentions concerning his testimony being uncontradicted in some particulars, I remind you of the rule that neither this Court, nor any other trier of fact, is obliged to accept as true the testi-

*Words within brackets supplied from stenographic transcript of District Court's proceedings.

mony of parties and interested witnesses merely because there may be no directly controverting testimony; particularly is this true if the so-called "uncontradicted" testimony is found inherently incredible. Actually, in most, if not all, of the instances of uncontradicted testimony asserted by plaintiff, direct evidence to the contrary can be found in the record.

Now, one other preliminary. The precise matter now before me is a motion to dismiss under [2130] Rule 41(b). 41(b) provides in part: "After the plaintiff has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief." The next following sentence reads: "In an action tried by the Court without a jury, the Court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render judgment until the close of all the evidence."

I take that language to mean that in a non-jury case on a motion to dismiss, the Court may weigh the evidence, as the old phrase used to be, or evaluate the evidence, and if the Court feels that it can do so, reach a conclusion on the facts upon the evidence presented up to that time. I understood that counsel in this case agreed to that proposition when we suspended in November. I notice that there is some possible suggestion to the contrary in plaintiff's brief, but since no further point has been made of it, I assume that all concerned adhere to the views expressed at the conclusion of our

hearing in November. In any case, for your enlightenment, [2131] and that is the only purpose of my speaking of it, I consider that I am permitted now, in the present posture of the case, to weigh and evaluate the evidence and to find the facts, if I feel that I can do so on the basis of the evidence before me.

Ordinarily I would not give too much time to a motion to dismiss where a considerable period of time had been devoted to trial of the case, and only relatively little additional time might be necessary to hear the whole evidence. Generally I feel that it is desirable to have the entire evidence presented so that on review, if appeal be taken, there will be no limitation upon the questions presented on the appeal and the whole case may be finally disposed of more readily on review, regardless of the result of the appeal.

In this particular case, however, it happens that the plaintiff has introduced substantial portions of the testimony of most, if not all, of the principal persons who might have knowledge of the facts of the case. Presumably, the testimony not offered at least would not affirmatively improve the plaintiff's case. Therefore, in this particular situation, I feel that it is especially appropriate that the Court very carefully examine the evidence presented [2132] and, if possible from that evidence, make a determination of the controlling facts. That is exactly what has been done during the presentation of the evidence and in the longer interval since. Consideration of the case has by no means been limited to the argument heard today. Many hours of careful and extensive study have been given to it.

Now, with that background, what are the problems? The very first step in this case is to determine what the relationship of or between Joseph and O'Donnell was during the period in question. It is clear that that relationship, so far as plaintiff's claim in this case is concerned, must be grounded in a contract. In other words, a contract in the full legal sense of that term is an essential basis of any right to relief plaintiff might have. The relationship called joint venture sounds in contract and without a contract the relationship does not exist.

Adverting to first principles and Hornbook law, we recall that a contract is a legally enforceable agreement between two or more parties. The essential elements necessary to transform an agreement into a legally enforceable contract include, among other things, competent parties, a subject [2133] matter, legal consideration, mutuality of agreement, and mutuality of obligation. The element of mutuality of agreement, or mutual assent, frequently has been referred to in the law as a "meeting of the minds" of the parties to the contract or agreement. To create a contract, then, the minds of the parties must meet as to every essential term of the proposed contract, and there must be a clear and unequivocal acceptance of a certain and definite offer in order that a mere agreement may become a contract. Therefore, it is necessary, among other things, that the minds of the parties meet as to the essential terms of the proposed contract. There must be a reciprocal assent to a certain and definite proposition between them. As long as any substantial or material

matters are left open for further negotiation or consideration on an essential and necessary element of a proposed contract, the contract is not complete, and the agreement, if there has been such, is not enforceable as a legally enforceable contract.

Now, those are all Hornbook propositions that every one of us has heard since our first year of law school. The question is, how do we apply those principles to this case. The *sine qua non* of Joseph's case has to be a "meeting of the minds," [2134] a specifically known and understood agreement, between him and O'Donnell, that they were going to make a joint purchase of Kinzua. Irrespective of other contract elements that might be required, at least that one essential fact would have to be found as an indispensable element of plaintiff's case.

The burden rests upon the plaintiff in the first instance to establish the existence of the joint purchase agreement as an element of a contract of joint venture. A mere preponderance of evidence would be sufficient to establish the existence of the contract in the first instance. The initial question that I have to concern myself with is whether there is a preponderance of the evidence here showing that Joseph and O'Donnell had a specific, definite, and clear offer and acceptance between them to the effect that they were going to make a joint purchase of this Kinzua property. Such a contract could only be established by either express words to that effect or by implication arising from the conduct of the parties or by a combination of both. There

is no other possible way that it could arise, that basic contractual relationship between them. [2135]

Now, let us consider each of those methods separately. The only spoken or written words claimed by Mr. Joseph to be express words amounting to such a contract are those that he said he spoke to Mr. O'Donnell and heard from him on November 18, 1952, in a bar at the University Club in Portland over a drink. Nowhere else are there claimed to be any express words sufficient to constitute a contract. After pondering this very long and arduously, I am completely satisfied that there were no express words of agreement passing between Joseph and O'Donnell which would amount in law to a contract. I cannot find that any such words were spoken by Joseph or, if so, that they were understood and assented to by O'Donnell.

I am not going into the details of telling you why I have reached that conclusion, gentlemen, because there are a great many factors appearing in the evidence that lead me to that conclusion. I think you may have gotten one facet of it from the comment that I made during Mr. Hokanson's argument, and I will mention that only, without intending *expressio unius est exclusio alterius*. I can't believe and don't believe that Chinn and O'Donnell are such scoundrels and so stupid as originally [2136] by deposition to have denied meeting Mr. Joseph the evening of November 18 when in fact they remembered the meeting. It would be ridiculous, in the light of the telegram, hotel registration, and other records of the event which they must have had in mind if they actually remembered the

meeting. Moreover, if both of them were that foolish and dishonest, I can't imagine that their counsel would have been so during this period of about a month before the depositions, while they were, according to Mr. Clinton, rehearsing and drilling Mr. O'Donnell and Mr. Chinn for their testimony. I gather the impression that Mr. Clinton feels that Mr. O'Donnell at least went through quite an educational period prior to his deposition. I can't imagine that these counsel would be so inadequate to the situation as not to inquire whether they registered at a hotel or whether they sent any telegrams or whether they had signed any chits. Even if I thought Mr. O'Donnell and Mr. Chinn to be as untrustworthy as the plaintiff contends they are, I couldn't believe them to be so unwise as to deny what they must have known could easily and indisputably be proved.

I am absolutely satisfied that Chinn and O'Donnell completely forgot ever having met Joseph [2137] the night before the meeting with Coleman on November 19th. If so, then I can't believe that at that genuinely forgotten or overlooked meeting O'Donnell consciously and expressly made a commitment for a 50-50 joint purchase of properties running into multiple millions of dollars in value. If they did so, the drink in progress at the time of the alleged commitment must have been extremely intoxicating. This is just one of the many circumstances in the evidence that has led me to the firm conclusion that there were no express words of mutual understanding and assent sufficient to amount to contract between Joseph and O'Donnell.

I have no doubt that Mr. Joseph may have spoken hopefully of the matter. Surely, he wouldn't have come by the way of Portland on his way to California from Chicago if he didn't have hope something of profit might develop. It is quite likely that he did speak hopefully of the matter and perhaps expressed the hope or even suggestion that somehow or other, sometime or other, a deal might be worked out. However, let us keep in mind now, gentlemen, that here are two total strangers that at that time never have had any transactions before and neither one knows much about the other. [2138] Neither one of them knows much about the Kinzua properties or the basis of their possible purchase. Joseph didn't know much about it. All he knew was that Terman said Kinzua was for sale. That is all. There is very little more that Joseph knew about it. To me, the evidence is most convincing that when he learned of the magnitude of the deal the next day from Coleman, Joseph was quite astounded and realized that any personal participation by him would be relatively small. I don't think that Mr. Joseph knew very much about Kinzua on the evening of November 18th and certainly O'Donnell knew very little about it at that time.

It is difficult for me to believe that a man like O'Donnell who has lived as long as he has and been in business as long as he has and has stayed out of bankruptcy as long as he has, would buy a "pig in the poke" within a matter of a few hours of meeting a man that he never had seen before excepting sometime long prior in St. Louis and then only across the room, a man as to

whom he knows practically nothing; that he, O'Donnell, would immediately and readily over a casual drink agree to a 50-50 joint purchase in a transaction that was going to run into multiple millions of dollars. I [2139] don't believe it. That is not to say it might not have happened, but I don't believe it, and it happens to be my responsibility, at least in the first instance, to decide the fact.

Now, let us go to the next point. Was there any course of conduct between these men that gave rise to the implication that they had a legally binding contract for a joint purchase of Kinzua? I have looked the evidence over from stem to stern and I can't find it. Of course, if you start with the assumption that they had an express agreement to that effect in the first place, then you can find support for the assumption in isolated parts of the conduct afterward; but if you don't start with that assumption, you can't find a contract in the course of conduct of the parties.

As a matter of fact, one of the remarkable things about the case is the infrequency of contact between Mr. Joseph and Mr. O'Donnell in a deal involving such magnitude as this. I haven't counted them up, but the contacts between them were very, very few; not many. I don't remember the exact number, but there were a few telephone calls and a couple of notes. I don't think there ever was so much as a full-length or formal letter, and none of [2140] Joseph's notes express any terms of an agreement between them, recite it, or even refer to it. I can't imagine that Mr. Joseph is so guileless that he would be involved in a deal of this magni-

tude with a man that he had very little acquaintance with, without at least dropping him a letter expressing pleasure at meeting him and confirming an agreement made, or in some way or other making some recital of the essence of it. I just don't think that Mr. Joseph who has lived as long as he has, and has been as successful as he has, would do business that way. Now, it may be that it was so and again I may be mistaken, but I don't believe it. The evidence is wholly insufficient to establish a contract arising by implication from the conduct of the parties.

In my judgment, gentlemen, for better or for worse, the words and actions of these parties, O'Donnell and Joseph taken together, in other words, the express words and the conduct, all of it taken together, amount to no more, at the very most, than an understanding that Kinzua would be investigated and the possibility explored of a deal in which each of them might participate in some manner and to some extent never specified. I think that is the [2141] most you can say about it. I think there was no agreement at all, except at most to investigate and explore possibilities. Certainly, none of the essential elements, let alone the important details of execution, of so important a venture contract were ever expressed and cannot reasonably be implied. Under the evidence which to me seems credible, the relationship between these parties at best is so vague, indefinite, and speculative, that as the trier of fact I cannot find assent and agreement on minimum elements amounting to a legally enforceable contract. I am not going to discuss the matter of consideration

or any other particular negating contract, because in my judgment the first essential element of the case, that is, agreement to make a joint purchase, is lacking.

Among other things leading me to that conclusion is the conduct of Mr. Joseph from the latter part of March until the latter part of August. During that five-month period while he claims to have had the biggest deal of his life by far hanging fire, he never once telephoned, dropped a note, or made an inquiry of O'Donnell. His lack of interest in the matter during that five-month period is just astounding, if you accept his story that he had a [2142] legally enforceable contract with O'Donnell to share equally in a deal of that magnitude. I simply cannot believe and accept the story.

The record here shows that Mr. Joseph is a man who frequently makes memoranda concerning business transactions. The exhibits are replete with memoranda of Mr. Joseph, notes and letters to Terman, the memos and various prospecti to his Chicago friends and what not. Yet not one word from Joseph to O'Donnell for five months. Now, I think that that is inconsistent with there ever having been any contractual obligation between Joseph and O'Donnell in the first place; and, secondly, I think that under those circumstances, considering all the factors in the situation, O'Donnell was certainly justified in believing that he had no duty to Joseph, and that the relationship, if any, between them, whatever it was, had been terminated.

If you add to that five months' silence and inaction the next following circumstance, astonishment and in-

credulity increase. When Mr. Joseph saw the notice of the Kinzua sale in the "Timberman", he wrote a nice letter to Mr. O'Donnell. Now I can understand the nice letter; apparently [2143] it was to try and get some kind of admission out of O'Donnell. That is somewhat out of keeping, however, with the contention of Mr. Joseph's being so completely naive and open about the whole thing. The only way I can account for his writing such a cordial letter is on the theory that it would induce O'Donnell into making some incriminating admission or statement about the deal, because, according to Joseph's testimony and according to notes purportedly written by Joseph at the time, he felt very bitter towards O'Donnell when he wrote that letter. He didn't put that feeling or any other of his present contentions in the letter.

All right. The letter goes forward, and in September, I think it was September, he gets a response from O'Donnell. Now, that response in many respects is not very satisfactory. There is no question about it. But it certainly is clear in one thing, that O'Donnell didn't take any counsel from anyone before he wrote it. He just dashed it off, and there is no doubt that it wasn't all that it might have been from his point of view. It is another one of those things that I talked to you about at the beginning, the inadequacies, the defects of persons as witnesses sometimes speak more [2144] heavily as to their veracity than when everything they say fits together too well.

In any case, the significant thing is that Mr. Joseph didn't make any response or assert any claim for 20

months after receiving O'Donnell's letter. That is, from September, 1953, until May, 1955, when the first demand on behalf of Joseph was made. I just can't believe that that is consistent with Joseph's present assertion that he had a clear and definite commitment for a binding contract of joint venture with O'Donnell. From the end of March to the end of August, 1953, five months, Joseph made no contact whatever with O'Donnell, then he writes this cordial letter and gets a response in 30 days, or whatever it was, and then another silence for 20 months after that. Either circumstance standing alone would throw the gravest doubt on Joseph's claim of joint venture; the two together make the claim incredible and untenable.

In my judgment, whatever the relationship between Joseph and O'Donnell was—I am confident it was not joint venture or contract of any kind—but whatever it was, it was terminated at or about the end of March of 1953. I am confident that as of that time it was known and understood by the [2145] parties that Joseph's hope of participation in the Kinzua purchase was terminated, and that at the very least, under the circumstances O'Donnell had a right to believe that it was. I certainly cannot find it in my mind or conscience to believe the contrary from the evidence submitted to me. I must call the facts as I see them after carefully weighing the evidence, and that is the way I see them.

If we started with the finding that there had been a contract of joint venture between O'Donnell and Joseph giving rise to a fiduciary relationship between

them, I would approach the whole thing on an entirely different basis. In such case, the onus would be upon the defendants, as has been pointed out in the cited authorities. On the question of whether or not there had been abandonment by Joseph or laches on his part, the burden would rest upon the defendants. Even in that situation I am inclined to think that the result might well be the same. I find and hold that the long failure of action by Joseph after August of 1953 under the conditions existing at the time, amounted to laches. During that 20-month period, when there were high hazards in the Kinzua purchase and in the lumber industry generally, Joseph made [2146] no request for a part of the deal. He let defendants put up the money and the effort and take the risks. Joseph waited to assert his claim until it seemed certain the purchase would prove profitable. He is now estopped from asserting any claim he might otherwise have had.

It is easy enough, speaking from hindsight, to talk about defendant's gain of 12 million dollars or 20 million dollars, or whatever was asserted in the argument, but it is quite apparent to me that during the long hazard period when Mr. Joseph might have shared a loss and lost his shirt, he was not anxious to press any claim for participation in the purchase. That is borne out to some extent by the changes in the condition of the lumber market as to which there is no dispute in the evidence. As a matter of fact, Joseph himself called the attention of O'Donnell to the unfavorable conditions in the lumber industry in the early part of 1953.

Time is not available for further elaboration of my

views. I think the motion to dismiss the action on the merits and with prejudice must be granted. It is so ordered. [2147]

[Endorsed]: Filed Feb. 7, 1957.

[Endorsed]: No. 15669. United States Court of Appeals for the Ninth Circuit. Harry Joseph, Appellant, vs. Donover Company, Inc., a corporation, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed: August 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

APPENDIX II

**FINDINGS OF FACT, SUPPORTED BY REFERENCES
TO THE RECORD, AND CONCLUSIONS OF LAW**

FINDINGS OF FACT**I.**

The court has jurisdiction of the subject-matter of this action based upon diversity of citizenship and amount. Plaintiff, Harry Joseph, is a citizen of the State of Illinois. The defendant Donover Company, Inc., is a Washington corporation having its registered office situated in Elma, Grays Harbor County, Washington; and the defendants Kinzua Corporation and Capital Timber Products are Washington corporations having their registered offices situated in Seattle, King County, Washington. The individual defendants are citizens of the State of Washington and residents of King and Snohomish counties in said state. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00 (Admitted Fact No. I, R. 153-4*).

II.

The oral memorandum decision of the court rendered in this cause on January 18, 1957 and appearing in the record herein at pages 2126 to 2147, inclusive, of the transcript, is by this reference incorporated into and made a part of these findings of fact to the same effect as if such decision were fully set forth herein. All findings of fact and inferences therefrom expressed by

*The matters within parentheses are citations to the record which support the findings for which they are given.

the court in such memorandum decision, particularly with regard to the credibility of witnesses and the weight and value to be given to the various items of evidence in the record of trial, are hereby expressly adopted and incorporated herein by this reference as if fully set forth in this paragraph (Oral Decision, R. 4246-63).

III.

(1) Kinzua Lumber Company (now dissolved) was a West Virginia corporation engaged in extensive timber, logging and lumber manufacturing operations in the State of Oregon. The assets of Kinzua Lumber Company (hereinafter called Kinzua) and its wholly owned subsidiaries consisted, among other things, of extensive timber and timberlands, mills, townsite, railway, mill and logging machinery and equipment, of the value of many millions of dollars (Admitted Fact No. III, R. 154-5).

(2) Plaintiff, Harry Joseph, is a wholesale and retail distributor of lumber products and building materials in the City of Chicago. Joseph had had no experience in timber, logging, sawmill or lumber manufacturing operations (Joseph, R. 314, 487-8).

(3) Defendant Harry J. O'Donnell is an experienced timber, logging, sawmill and lumber manufacturing operator in the Pacific Northwest (O'Donnell, R. 1406, 3388-3409).

(4) Raleigh Chinn is engaged in the wholesale distribution of plywood and other timber products (Chinn, R. 785-6). Chinn had sold plywood to and had been a business acquaintance of Joseph for many years

(Chinn, R. 788) ; Chinn was also a business and social acquaintance of O'Donnell (Chinn, R. 786-7).

(5) Samuel Terman is a real estate broker in Beverly Hills, California. His business was generally confined to real estate operations (Terman, R. 1146) ; he was totally unfamiliar with timber, logging, sawmill and lumber manufacturing operations and he had had no previous experience with respect thereto (Terman, R. 1147). Terman formerly resided in Chicago, Illinois, where he had been a longtime social acquaintance of Joseph (Terman, R. 1147).

(6) James J. Needleman and J. George Gold are attorneys at law and co-partners practicing law in Beverly Hills, California under the firm name of Gold & Needleman (Gold, R. 2883-4; Admitted Fact IX, R. 156). They were attorneys for Gladys Anderson Zurlo, one of the principal stockholders of Kinzua Lumber Company, and were directors and members of the Executive Committee of said corporation (Admitted Fact IX, R. 156; Needleman, R. 2693, 2696-8; Gold, R. 2935; Exhibit 653). Needleman was an intimate social acquaintance of Terman (Terman, R. 1281).

IV.

(1) During 1951 the shareholders of Kinzua agreed to sell their shares and they appointed Kinzua's President, J. F. Coleman, and its attorney, John T. Casey, along with two others as their sole and exclusive representatives and agents to effectuate a sale upon such terms as said representatives and agents might determine (Admitted Fact III, R. 154-5; Gold, R. 2894; Needleman, R. 2707-9).

(2) Terman learned of the proposed sale of Kinzua's stock from Needleman, but Needleman did not give Terman any specific or detailed facts or information pertinent to Kinzua or the sale of its stock (Needleman, R. 2764); nor did Terman otherwise learn or obtain any such detailed facts. However, Terman did know that the price to be asked would be substantial and that the assets included a large tract of timber, a railroad, a town and a sawmill (Terman, R. 1152-4, 1222-4).

(3) Terman told Joseph that Kinzua's stock was available for purchase (Joseph, R. 324-5; Terman, R. 1161). On October 15 and again on October 24, 1952 (while Chinn was attending a lumber convention in Chicago) Joseph told Chinn that he had learned from Terman that Kinzua was for sale (Joseph, R. 334-5; Chinn, R. 817-8), and on the latter of said dates Joseph introduced Chinn to Terman (Joseph, R. 343). On November 6, 1952 while Chinn and O'Donnell were in Los Angeles, on the separate business of each, unrelated to Kinzua (Chinn, R. 835), Chinn called Terman and Terman visited with Chinn and O'Donnell in the presence of others (Chinn, R. 871-2; Terman, R. 1221-3; O'Donnell, R. 1604-16); O'Donnell asked Terman concerning Kinzua, but Terman was unfamiliar with its operations or the terms or conditions of sale and he was unable to and did not supply any specific or detailed facts or information with respect thereto (Terman, R. 1222-3; O'Donnell, R. 1605-8). Terman reported his visit with Chinn and O'Donnell to Joseph (Joseph, R. 350-1) and to Gold (Terman, R. 1225). Thereafter Joseph arranged to meet Coleman in Port-

land on November 18 or 19, 1952 (Joseph, R. 363) on Joseph's way to a vacation in La Quinta, California (Joseph, R. 520-1; Chinn, R. 930). Joseph called Chinn in Seattle and invited Chinn and O'Donnell, an experienced sawmill operator, to attend the Portland meeting with Joseph and Coleman (Joseph, R. 363).

V.

(1) Joseph, Chinn and O'Donnell arrived in Portland on November 18, 1952 (Joseph, R. 369-70; Chinn, R. 894) and since they were unable to meet with Coleman that evening, they spent the evening together at the University Club (Joseph, R. 372) and a night club in Portland (Joseph, R. 374). Neither Chinn nor O'Donnell remembered meeting Joseph that evening until their memories were refreshed by hotel records and club bills (Chinn, R. 901-2; O'Donnell, R. 1623). Joseph and O'Donnell may have met once before, quite casually many years previously (O'Donnell, R. 1621), but they had had no previous relationships with each others, business or otherwise, and they knew little or nothing about each other (Joseph, R. 371). Except for such information as Joseph had obtained from Terman (which was substantially the same as that referred to in finding IV (2) *supra*), none of the parties **knew much** about Kinzua's property or the basis of its possible purchase (Joseph, R. 374-5). During the evening of November 18, 1952, there may have been some casual conversation concerning the exploration of the possibility of negotiating for a purchase of Kinzua, but O'Donnell did not consciously or otherwise make or assent to any offer, proposal, agreement, commitment or understanding with respect to Kinzua, nor did any

conversation or event of that evening lead Joseph to believe that O'Donnell had made or intended to make or assent to such an offer or commitment (Chinn, R. 905; O'Donnell, R. 1655).

(2) On the morning of November 19, 1952, Joseph, Chinn and O'Donnell met with Coleman and Casey (Admitted Fact VIII, R. 156; Joseph, R. 375). At the meeting Coleman and Casey announced that Kinzua's sales price was \$12,000,000.00 (Joseph, R. 378; Chinn, R. 914), payable \$4,800,000.00 in cash and the balance in annual instalments of \$900,000.00 with interest at the rate of $4\frac{1}{2}\%$ per annum (O'Donnell, R. 1634). Coleman and Casey outlined Kinzua's holdings, operations and financial affairs in general terms only, intentionally withholding detailed data, including timber cruise data, profit and loss and operating statements, pursuant to previous agreement between Kinzua's sales representatives that they would not negotiate with prospective purchasers until said representatives became satisfied that such purchasers were dealing solely as principals, were persons of integrity and responsibility and had sufficient operating capabilities and financial resources to purchase and operate Kinzua's properties (Joseph, R. 377-9; O'Donnell, R. 1634). Coleman and Casey stated that they would not permit inspection or investigation of Kinzua properties and financial affairs without the prior deposit by the prospective purchasers of \$600,000.00 in cash, subject to the condition that it would be returned to such purchasers if Kinzua's holdings and financial statement were not as represented, otherwise to be applied on the

purchase price or alternatively to be forfeited if the purchase was not completed (Joseph, R. 377; Chinn, R. 915).

(3) Following the meeting with Coleman and Casey, Joseph, Chinn and O'Donnell had a hurried, five-minute conversation prior to O'Donnell's departure by plane (Joseph, R. 381). During this conversation Joseph protested that the price asked for Kinzua was too high and unreasonable (Chinn, R. 921; O'Donnell, R. 1643); O'Donnell, however, stated that if Kinzua actually had the timber and assets as represented by Coleman and Casey the price might be all right (Chinn, R. 921; O'Donnell, R. 1643). Joseph suggested that "maybe some of the boys who had some tax money could get together and put up \$600,000.00 and that the deal could be sold to someone else", but O'Donnell rejected the suggested stating that he was a sawmill operator and as such was "not interested in peddling sawmills." (O'Donnell, R. 1643-5; Chinn, R. 924-5). Although Joseph suggested that some of his Chicago acquaintances might be interested in a deal of this kind he did not state or otherwise indicate who they might be, nor the amounts they might invest, if any, either individually or collectively (Joseph, R. 556; O'Donnell, R. 1645-6). Joseph merely stated that he would let O'Donnell know if any of them became interested (O'Donnell, R. 1645). O'Donnell inquired of Joseph what Terman's interest in Kinzua might be and Joseph told O'Donnell he was simply a friend of Joseph's and Needleman's and that there was no need to worry about him. Joseph did not advise O'Donnell or Chinn that Terman was expecting any commission from Kin-

zua's purchasers or otherwise (O'Donnell, R. 1646-7; Chinn, R. 921-4).

(4) The information which Joseph, Chinn and O'Donnell had, either individually or collectively, with respect to Kinzua following the meeting on November 19, 1952 with Coleman and Casey, was wholly insufficient for any of them to determine whether the purchase of Kinzua's stock was desirable or even feasible (O'Donnell, R. 1754).

(5) At no time, either before, on or after November 18 and 19, 1952, did Joseph request that O'Donnell investigate Kinzua or negotiate for the purchase of its stock or the financing thereof; nor did O'Donnell undertake or consent, gratuitously or otherwise, to so investigate or negotiate for the purchase of said stock or the financing thereof. Neither Joseph nor O'Donnell became or intended to become the agent of the other in any respect whatever; nor did either of them intend to be bound by the acts of the other, in any respect whatsoever. Neither Joseph nor Chinn nor O'Donnell made or entered into any understanding, agreement, representation, promise, commitment or undertaking, either written or oral, express or implied, with any of the others; nor did any of them intend so to do. None of them in fact entrusted or reposed confidence in any of the others insofar as Kinzua was concerned; nor did any of them believe or have reason to believe that any of the others did so. Joseph, O'Donnell and Chinn each considered their Portland meetings and their subsequent discussions to be exploratory in nature only; and neither O'Donnell nor Chinn ever had a meeting of the

minds with Joseph or any agreement or course of action or otherwise with respect to Kinzua. Neither Joseph, O'Donnell nor Chinn was bound, either expressly or by implication, to any course of action or conduct; and none of them intended so to be (O'Donnell, R. 1643-50, 1653-5; Chinn, R. 919-28).

VI.

(1) On or about November 26, 1952 O'Donnell and Chinn, together with O'Donnell's attorney and accountant, met with O'Donnell bankers, to canvass the possibility of obtaining more information concerning Kinzua, its assets and financial condition, without the prior deposit of \$600,000.00 (O'Donnell, R. 1665-9; Chinn, R. 938-42, 945-9; Dunn, R. 1058). As the result of said meeting, A. R. Munger, President of Seattle-First National Bank, O'Donnell's bank, contacted officers of the First National Bank of Portland, Kinzua's Portland bank, and a meeting with the officers of the Portland bank was subsequently held on December 9, 1952 (Dunn, R. 1021-2, 1062-3; O'Donnell, R. 1681-4).

(2) On his way back to his home in Chicago from his vacation at La Quinta, California, Joseph met with Terman, Gold, Needleman and Coleman (who was returning from a trip to San Diego) at Gold & Needleman's office in Beverly Hills, California, on November 29, 1952 (Joseph, R. 390-5). Coleman, however, supplied no additional information with respect to Kinzua, nor did he waive the requirement of a cash deposit of \$600,000.00 as a condition precedent to an inspection of Kinzua's holdings and operations and to supplying detailed information (Joseph, R. 518-19; Ter-

man, R. 1244). During this meeting a call was made to O'Donnell, during which Coleman told O'Donnell that he was willing to confer further with O'Donnell and Coleman suggested that O'Donnell and the defendants Wyman come to Portland to meet with Coleman and Casey (Joseph, R. 396-7; O'Donnell, R. 1673-4).

(3) On December 3, 1952, O'Donnell and Chinn together with the defendants Wyman met with Coleman and Casey in Portland (O'Donnell, R. 1676-9; Chinn, R. 950-2). At this meeting O'Donnell told Coleman and Casey that he would not pay \$600,000.00 to look at any patch of timber and a sawmill (Chinn, R. 953; O'Donnell, R. 1679). Coleman and Casey, however, did not waive the \$600,000.00 cash deposit as a condition to investigation and inspection of Kinzua's holdings and financial affairs (O'Donnell, R. 1679, 1685). At this meeting Coleman and Casey advised that they desired an "all cash" deal (O'Donnell, R. 1679, 1688). No proposals, agreements, commitments or undertakings of any kind were made by any party at the meeting (O'Donnell, R. 1679; Chinn, R. 957). O'Donnell told Joseph about the meeting (O'Donnell, R. 1681, 1707) and without O'Donnell's knowledge Joseph asked for and received through Terman and Needleman a report from Coleman about the meeting (Terman, R. 1246-7).

(4) As the result of arrangements made by A. R. Munger, President of the Seattle-First National Bank, O'Donnell, together with his bankers, A. R. Munger and Clayton Watkins, Vice-President of the Seattle-First National Bank, and O'Donnell's attorney, Bry-

ant R. Dunn, and O'Donnell's accountant, Paul Nielsen, met with officers of the Portland First National Bank, Kinzua's bankers, on December 9, 1952 (O'Donnell, R. 1681-4; Dunn, R. 1021). The purposes of the meeting were to get more information about Kinzua and to persuade Kinzua's representatives to permit an inspection of its properties and operations without the prior deposit of \$600,000.00 by demonstrating to Kinzua bankers, that O'Donnell, McLellan (at the time a potential investor) and the defendants Wyman were responsible, and that they had ample resources to handle Kinzua's purchase and to operate its properties in the event of purchase (O'Donnell, R. 1684, 1698; Dunn, R. 1021-2). Following the meeting, Don Silverthorne, Vice President of the Portland First National Bank and Coleman's banker, suggested that O'Donnell and his party remain in Portland overnight to see Coleman (O'Donnell, R. 1694; Dunn, R. 1022-3). Following conferences on December 10, 1952 among Coleman, Silverthorne, Munger and O'Donnell, Coleman gave O'Donnell permission to inspect Kinzua's properties without the prior deposit of \$600,000.00 (O'Donnell, R. 1698; Dunn, R. 1024) but he continued to withhold financial and operating statements and other detailed data (O'Donnell, R. 1852-3).

(5) Upon O'Donnell's return to Seattle he reviewed with Joseph the occurrences of the December 9 and 10, 1952 meetings at Portland by telephone (Joseph, R. 403; O'Donnell, R. 1742-3). Either then or shortly thereafter O'Donnell outlined or caused to be outlined to Joseph in a general way a possible plan of operation

of Kinzua whereby the corporation would be dissolved and its assets distributed to the individual purchasers (O'Donnell, R. 1709; Joseph, R. 407). This information was furnished to Joseph at his request to provide him with "ammunition" to approach possible Chicago investors (O'Donnell, R. 1710; Dunn, R. 1009-14). O'Donnell also told Joseph that O'Donnell was arranging to investigate Kinzua's operations at Kinzua, Oregon with one Ivan Kesterson, an experienced lumber and timber operator (Joseph, R. 403-4; O'Donnell, R. 1744); Kesterson was financially able to invest substantial sums in Kinzua on his own behalf as a principal and could participate in the management as an operator (O'Donnell, R. 1769-70).

VII.

(1) On December 15, 16 and 17, 1952 O'Donnell and Ivan Kesterson visited Kinzua (O'Donnell, R. 1762-8), together with D. E. Wyman and inspected a portion of Kinzua's lowlying timber and its sawmill and factory operations (O'Donnell, R. 1764-8), but inclement weather conditions precluded inspection of Kinzua's main bodies of timber (O'Donnell, R. 1765, 1773). The timber inspected appeared to be short-bodied, black knotted and bug infested (O'Donnell, R. 1770-3, 1784-5). O'Donnell was of the opinion that a substantial increase in the mill's production would be required to service the proposed purchase which increase would in turn require extensive changes in the mill's lay-out involving substantial expenditures, and drastic shifts in personnel which, potentially, was or could be the source of labor troubles (O'Donnell, R.

1784-6). Kesterson determined not to participate in Kinzua, either as an investor or operator or otherwise (O'Donnell, R. 1775-7).

(2) To assure the success of the Kinzua venture, particularly under the conditions above outlined, the services of a capable and experienced timber and saw-mill operator were required on the ground at Kinzua (O'Donnell, R. 1796). O'Donnell knew that Kesterson had determined not to participate in Kinzua (O'Donnell, R. 1775-7). When O'Donnell returned to his home in Seattle following his inspection of Kinzua's properties, his wife, who for many years suffered chronically from migraine headaches accompanied by periods of extreme anxiety and depression, was acutely ill and was in a highly and dangerously depressed condition which required him to be up with her most of the night of December 18, 1952 (O'Donnell, R. 1924-30, 1937). Under the circumstances O'Donnell determined not to pursue the Kinzua matter (O'Donnell, R. 1796). On the morning of December 19, 1952 O'Donnell called Coleman and so advised him (O'Donnell, R. 1777-9). During this call O'Donnell told Coleman that he was sorry he had taken up so much of Coleman's time; O'Donnell also told Coleman that he had reason to believe that Georgia Pacific was interested in timber properties such as Kinzua's and that O'Donnell would be glad to bring it to the attention of Georgia Pacific if Coleman wanted him to do so (O'Donnell, R. 1779); and Coleman said he would appreciate O'Donnell so doing, and a few days later he did so (O'Donnell, R. 1779-83, 1938-9).

(3) During a telephone conversation with Joseph on December 19 or 20, O'Donnell told Joseph what he and Kesterson had observed and discovered during his investigation of Kinzua, including the changes required to increase the mill's production to the extent necessary to service the purchase price and the risks incident thereto (Joseph, R. 434, 538-40; O'Donnell, R. 1783-6); O'Donnell further advised Joseph that he had determined not to pursue the Kinzua matter (O'Donnell, R. 1783-4). Neither during this conversation nor at any other time was there any agreement, understanding or commitment between Joseph and O'Donnell that they were to call or otherwise contact each other (O'Donnell, R. 1797). O'Donnell's determination not to participate in Kinzua's purchase was definite and complete and he so advised Joseph, and such determination was made in good faith. O'Donnell made no misrepresentation, consciously or otherwise, of any kind with respect to Kinzua or O'Donnell's intention with respect thereto; O'Donnell did not deceive or mislead Joseph in any way, nor did he intend so to do (O'Donnell, R. 1783-6, 1789-97; Dunn, R. 1033-4).

(4) On December 20, 1952 Joseph had a conference call by long distance telephone with Terman and Needleman in Los Angeles, in which the preceding phone call between O'Donnell and Joseph was discussed (Joseph, R. 572-6; Terman, R. 1358-61). At this time Joseph suspected that O'Donnell was attempting to "shake him out of" the Kinzua purchase (Terman, R. 1363-4; Joseph, R. 589). On December 26, 1952 Joseph called Coleman in Seaside (Joseph,

R. 547-9). Joseph did not thereafter contact or talk to Coleman (Joseph, R. 531, 644, 497).

VIII.

(1) On December 30, 1952 Joseph called upon A. C. Allyn, chairman of the board of A. C. Allyn & Co., Inc., Chicago investment bankers, and told him that the Kinzua properties were available for purchase (Joseph, R. 447-9; Allyn, R. 2871). Joseph gave Allyn the brochure of Kinzua, Exhibit 121, and a pencil memorandum (Allyn, R. 2872-3, 2880). Joseph told Allyn that A. R. Munger, President of Seattle-First National Bank, was familiar with the matter, but he did not mention O'Donnell to Allyn by name or otherwise (Allyn, R. 2873, 2877). Joseph did not tell Allyn what Joseph's interest in Kinzua was; nor was the matter discussed (Allyn, R. 2877). Joseph did not tell Allyn that either Joseph or anyone else was interested in participating in Kinzua's purchase (Allyn, R. 2881). The meeting between Allyn and Joseph did not exceed fifteen minutes in length (Joseph, R. 451) and there was no discussion between them concerning Joseph's interest (Allyn, R. 287). Allyn would only be interested in Kinzua as an equity investor (Allyn, R. 2877).

(2) At A. C. Allyn's direction, Douglas Casey, President of A. C. Allyn & Co., Inc., called A. C. Allyn & Co.'s northwest representative, W. M. Marshall, in Spokane and directed him to investigate Kinzua (Marshall, R. 3349-51).

(3) On the same day Marshall from Spokane called A. R. Munger who referred him to O'Donnell as being familiar with the subject (Marshall, R. 3350). Mar-

shall then called O'Donnell and told him that Joseph had referred Kinzua to A. C. Allyn and that Marshall had been directed to investigate the matter. Marshall made arrangements to meet O'Donnell thereafter in Seattle (O'Donnell, R. 1803-4).

(4) On January 5, 1953 O'Donnell met with Marshall in O'Donnell's office in Seattle (O'Donnell, R. 1804; Marshall, R. 3351). O'Donnell gave Marshall such information as he had about Kinzua and its purchase (O'Donnell, R. 1804-7). O'Donnell told Marshall that the timber had not been adequately inspected, nor could it be until the spring (Marshall, R. 3352), and that it was not feasible until then to determine the desirability of the purchase (Marshall, R. 3352). O'Donnell also told Marshall that he was going to Palm Springs with his family, that he was going to forget about Kinzua until his return late in March, and that upon his return he would contact Marshall if he were interested at the time (O'Donnell, R. 1808-9).

(5) Due to A. C. Allyn's interest as a possible equity investor and the improved physical condition of his wife, O'Donnell's interest in Kinzua became somewhat revived (O'Donnell, R. 1814, 1817, 1826-7). In early January, O'Donnell met Stuchell, an experienced timber and sawmill operator, and told him about Kinzua. O'Donnell asked Stuchell if he would be interested in Kinzua, both as an investor and as an operator (O'Donnell, R. 1424-7, 1826-7). Stuchell stated that he might be interested if he liked the deal after investigation (O'Donnell, R. 1426-7).

(6) On January 5, 1953 O'Donnell called Joseph in

Chicago and inquired of Joseph concerning Allyn's interest in Kinzua (Joseph, R. 554-5; O'Donnell, R. 1809). Joseph told O'Donnell that he had told Allyn about Kinzua (Joseph, R. 555). During either this conversation or one on January 9, 1953, O'Donnell told Joseph that he (O'Donnell) was "lukewarm" about Kinzua and that he was going to Palm Springs for a vacation (Joseph, R. 556-7; O'Donnell, R. 1810-11). O'Donnell told Joseph that O'Donnell and others around Seattle could easily get together \$2,500,000.00 to participate in Kinzua's purchase and O'Donnell specifically inquired about Joseph's interest in Kinzua (O'Donnell, R. 1810-11). Joseph replied that whatever interest he might have in Kinzua would be with the Allyn group (O'Donnell, R. 1811), and Joseph requested that O'Donnell cooperate with Marshall and supply him with such information as O'Donnell had (Joseph, R. 557-8). Joseph did not then (or in fact thereafter) say or otherwise indicate that he would invest any money; nor did he say that any other persons might invest in Kinzua (Joseph, R. 555-6).

(7) Joseph received a letter, dated January 7, 1952 (Exhibit 46) from the La Salle National Bank quoting the following excerpt from the January, 1953 issue of *Banking*, published by the American Bankers Association:

"In the Pacific Northwest trade area, there is a rather definite slackening in the tempo of business. In Seattle, the business level is sustained by the tremendous activity at the Boeing Airplane Company; nevertheless, many reliable barometers are trending downward. The same general condi-

tion is indicated in the Oregon territory. In that case, conditions in the lumber and plywood industry are a major factor. The plywood industry has a far more productive capacity than the present and prospective demand seems to justify and to all appearances the lumber and plywood business has some rather rough times ahead." (Exhibit 46; Joseph, R. 657-9)

IX.

(1) O'Donnell and his family left for Palm Springs on January 19, 1953, and neither he nor they returned to Seattle until March 23, 1953 (O'Donnell, R. 1939-41).

(2) While O'Donnell was at Palm Springs, Carl Coleman, J. F. Coleman's brother, invited O'Donnell to visit him and J. F. Coleman, who was coming to Shadow Mountain shortly (O'Donnell, R. 1818-21). On February 26, 1953 O'Donnell from Los Angeles called Joseph in Chicago and told him that O'Donnell was going to visit with J. F. Coleman at Palm Springs (Joseph, R. 453-4; O'Donnell, R. 1821, 1825). On February 27, 1953 Joseph sent a letter to O'Donnell reading as follows:

"Dear Harry:

"It was nice to talk with you on the phone and learn that you still have enough pep to consider operations such as we talked about on the phone, which makes me believe that your rest at Palm Springs has done you a great deal of good.

"Thought you might be interested in the photostatic copy hereto attached." (Exhibit 52; Joseph, R. 456)

The photostatic copy referred to was of the letter of January 7, 1953 from the LaSalle National Bank to

Joseph quoted in paragraph VIII(7), *supra* (Joseph, R. 456-8).

(3) During the last of February or the first few days of March, 1953, O'Donnell, together with Max A. Wyman (father of the defendants Wyman), visited with J. F. Coleman, and his brother and son, Carl Coleman and Mike Coleman at Palm Springs (O'Donnell, R. 1827-8). At the meeting Wyman said he would like to have W. H. Price, a timber engineer, then employed by the Wymans, look at the timber (O'Donnell, R. 1830, 1835-6) and J. F. Coleman agreed to advise O'Donnell when the weather would permit inspection of the timber which Coleman later did (O'Donnell, R. 1832-5).

(4) During the latter part of March, 1953 Price spent several days inspecting Kinzua's timber holdings and made a favorable oral report with respect thereto (O'Donnell, R. 1836-9). O'Donnell then decided to actively investigate the feasibility of Kinzua's purchase (O'Donnell, R. 1839-43); and shortly thereafter Stuchell, the three Wymans and O'Donnell, indicated their possible interest in each investing \$500,000.00 in Kinzua's purchase if further investigation showed that the purchase was feasible and desirable and if favorable terms of purchase could be negotiated (O'Donnell, R. 1836-44, 1947-8).

(5) On March 30, 1953 O'Donnell called Marshall in Spokane and told him that Price had made a favorable report concerning Kinzua's timber and that he would take a further look at Kinzua (O'Donnell, R. 1839-40; Marshall, R. 3354).

(6) On March 31, 1953 O'Donnell called Joseph in

Chicago and told him that Price had made a favorable report with respect to Kinzua's timber and that O'Donnell and others were going to go ahead and look the whole Kinzua deal over (O'Donnell, R. 1840-1, 1947-8), and he again indicated that he, the three Wymans and Stuchell each might put a half million in the Kinzua purchase and others not yet talked to probably would make more available (O'Donnell, R. 1948). Joseph reiterated that his interest was with the Allyn group and told O'Donnell to do his "business with Marshall" (O'Donnell, R. 1841, 1867-8, 1947-8). No arrangements were made during the conversation or subsequently for further discussions between Joseph and O'Donnell (O'Donnell, R. 1841). O'Donnell had reason to believe and did believe that the only interest Joseph then or thereafter had with respect to Kinzua was with the Allyn group exclusively (O'Donnell, R. 1867-8, 1882-3, 1947-8), and neither Joseph nor O'Donnell thereafter contacted or attempted to contact each other until after Kinzua's sale to the defendants was completed (Joseph, R. 467-8; Admitted Fact XXIV, R. 159-60).

X.

(1) On April 2, 1953 O'Donnell called Coleman and made arrangements to inspect Kinzua with Marshall, Lambert (a consulting engineer retained by A. C. Allyn & Co.) and Stuchell (O'Donnell, R. 1949-50; Marshall, R. 3354). On April 9 and 10, 1953 O'Donnell and Stuchell inspected Kinzua, but Marshall and Lambert did not join in the inspection because of conflicting engagements of Lambert (O'Donnell, R. 1950-1; Marshall, R. 3354-5).

(2) At the request of Coleman and Casey, O'Donnell called Marshall in Spokane on or about April 15, 1953 to determine whether Allyn was really interested in Kinzua (O'Donnell, R. 1849, 1951-2) and Marshall advised O'Donnell that some of the partners of A. C. Allyn & Co. and some of their clients were interested in buying undivided interests in timber and that Marshall was certain that Allyn was interested, and O'Donnell so advised Coleman and Casey (O'Donnell, R. 1849, 1951-2).

(3) On April 21, 1953 Marshall and O'Donnell met with Coleman and Casey in Portland (O'Donnell, R. 1852, 1952; Marshall, R. 3355-6). It was indicated to Coleman and Casey at the meeting that O'Donnell and associates wanted to take more than 50% of Kinzua's stock and that the remainder would be taken by partners of A. C. Allyn & Co. and a few of their clients (Exhibit 564; O'Donnell, R. 1880-2; Marshall, R. 3359-60, 3372-3). At the meeting Marshall advised Coleman and Casey that his people were interested in the Kinzua purchase and he requested financial and earning statements which for the first time were supplied to him and O'Donnell (O'Donnell, R. 1852-3; Marshall, R. 3360, 3373-5; Exhibit 564). Coleman and Casey advised Marshall and O'Donnell that Kinzua's representatives had arrangements to meet with other prospective purchasers on May 4, 1953 and Coleman and Casey demanded that they be given a definite decision on or before that date as to whether Allyn seriously intended to negotiate for Kinzua's purchase (O'Donnell, R. 1952-3; Exhibit 564). Marshall agreed to obtain a definite statement of

Allyn's position within 10 to 15 days (O'Donnell, R. 1953; Exhibit 564; Marshall, R. 3361). At the meeting arrangements were made for Marshall to inspect Kinzua's properties but the inspection was in fact never made (Marshall, R. 3361-3). On April 22nd Marshall contacted Coleman individually and discussed with him Kinzua's tax situation (Marshall, R. 3361).

(4) A. C. Allyn & Co. became involved in a financial transaction involving the Pacific Power & Light Company and because of this involvement Allyn determined, on or about April 27, 1953, to step aside from the Kinzua purchase and he instructed Marshall not to "further follow up the Kinzua Lumber Company deal." (Marshall, R. 3363, 3376-7; Allyn, R. 2875.) He advised Joseph that "we were getting out." (Allyn, R. 2875-6.) Joseph never asked Allyn the results of his investigation of Kinzua, nor did he ask that they be made available to him (Joseph, R. 633-4); nor did he communicate with O'Donnell, Chinn or Coleman (Joseph, R. 644, 634-6, 495-7).

(5) Marshall attempted to reach O'Donnell by telephone on April 27, 1953 to tell him of Allyn's decision, but was unable to do so at the time because O'Donnell was then out of the city (O'Donnell, R. 1954; Marshall, R. 3363, 3378-9). Marshall then called Coleman and advised him of Allyn's decision (Marshall, R. 3363, 3378). Coleman indicated to Marshall that Allyn's withdrawal would also eliminate O'Donnell (O'Donnell, R. 1444, 1989). Marshall, however, told Coleman that he thought O'Donnell could purchase Kinzua without Allyn, and Marshall asked Coleman to keep the door open for

O'Donnell until O'Donnell could contact him (Marshall, R. 3363, 3378).

(6) O'Donnell returned Marshall's call during the late afternoon or evening of April 27, 1953 and during the conversation Marshall advised O'Donnell of Allyn's decision to step aside from the Kinzua purchase because of involvement in the Pacific Power & Light utility consolidation (O'Donnell, R. 1440, 1954-5; Marshall, R. 3363-4; 3378-9). Marshall also told O'Donnell that he did not want Allyn's withdrawal to interfere with O'Donnell's right to purchase Kinzua and he advised O'Donnell that he was released completely and fully from any obligation to the Allyn group in relation to Kinzua (Marshall, R. 3363-4, 3379-80; O'Donnell, R. 1955).

(7) Following his long distance telephone conversation with Marshall, O'Donnell called Coleman on April 27, 1953 by long distance telephone and reported Allyn's withdrawal from Kinzua (O'Donnell, R. 1440, 1955). Coleman's reaction to O'Donnell's report was, "I guess this lets you boys out, doesn't it?" (O'Donnell, R. 1441, 1955.) O'Donnell requested additional time to confer with his Seattle associates and to contact other potential investors (O'Donnell, R. 1441, 1955). Coleman advised O'Donnell that he was about to enter into negotiations for Kinzua's sale with other purchasers and he demanded a prompt answer as to whether O'Donnell could and would go forward with Kinzua's purchase. Coleman requested that O'Donnell call back the next day, and O'Donnell agreed to do so (O'Donnell, R. 1441, 1955).

(8) On April 28, 1953 O'Donnell attempted to contact R. Howard Webster, a Canadian financier, to interest him in the Kinzua purchase (O'Donnell, R. 1435-6, 1439, 1441-2). Although O'Donnell was unable to reach Webster personally he did talk by long distance telephone to Webster's representative in New York on April 28th (O'Donnell, R. 1436). After talking to Webster's representative, O'Donnell called Coleman in Portland and informed him of his efforts to interest Webster in Kinzua (O'Donnell, R. 1957).

(9) O'Donnell talked to Webster in Montreal by long distance telephone on May 4, 1953 (O'Donnell, R. 1528-31, 1958), and arrangements were made for a meeting between the two in Los Angeles on May 9 and 10, 1953 at which time O'Donnell outlined the Kinzua matter to Webster (O'Donnell, R. 1531-2). O'Donnell suggested to Webster that Webster take 35% thereof, but this was rejected by Webster who desired to take either a minor percentage, not to exceed 10%, or 50% of the purchase (O'Donnell, R. 1552; Webster, R. 2657). Because of time limitations O'Donnell accepted Webster's proposal that Webster take 50% of the stock (O'Donnell, R. 1557, 1962). While Webster indicated a definite interest in the purchase of Kinzua he did not legally bind himself to participate therein and his future interest was subject to investigation of Kinzua's properties and the working out of other details made necessary by reason of the fact that he was a Canadian citizen (O'Donnell, R. 1557-8, 1958). On May 13, 1953 O'Donnell advised Coleman of the substance of his discussions with Webster and advised Coleman that nego-

tiations for the purchase of Kinzua could proceed with assurance that sufficient money was available to purchase the property (O'Donnell, R. 1557-8, 1958-9).

XI.

(1) Thereafter negotiations actively proceeded; the timber was cruised, and the purchase was consummated by the execution of purchase documents on August 17, 1953 (O'Donnell, R. 1959-61). During the course of negotiations the sellers for their own purposes voluntarily reduced the requested down payment from \$4,800,000.00 to \$3,345,000.00 (O'Donnell, R. 1961).

(2) O'Donnell originally planned to invest \$500,000.00 to be applied on the down payment or approximately 10% thereof (O'Donnell, R. 1948; Dunn, R. 1079). He eventually participated in Kinzua's purchase to the extent of 7% thereof, being some \$241,000.00 of the aggregate down payment made on the purchase price (O'Donnell, R. 1992). Webster, or those he designated, participated to the extent of 50% and Chinn to the extent of 1% (Exhibit 114).

(3) Joseph learned of defendant's purchase of Kinzua on August 27, 1953 (Joseph, R. 468, 641, 661; Exhibit 87). On August 27, 1953 Joseph wrote the following letter to O'Donnell (Joseph, R. 473; O'Donnell, R. 1898; Exhibit 90):

“Dear Harry:

“My attention has been called to a memorandum appearing in ‘The Timberman’ dated August 21, 1953, whereby you and others have purchased the Kinzua Pine Mills.

“I was a little surprised to learn this and would

appreciate your letting me know a little more about it.

“With kindest personal regards,

“Very truly yours,

“Harry Joseph”

On September 22, 1953 O'Donnell answered Joseph's letter of August 31, 1953 with the following letter (Joseph, R. 475, 639-40, 1898-9; Admitted Fact XXV, R. 160; Exhibit 93):

“Dear Harry:

“Please excuse my delay in answering your letter of August 31st. I have been out of town most of the time since the first of the month, and I am just getting around to catching up on some of my correspondence.

“When your group told me that they had lost interest in the Kinzua deal because of other utility deals, et cetera, that they had been interested in, I more or less dropped the matter and it lay dormant for a couple of months. Later on I ran into a fellow from Montreal whom I had been engaged in business with in the Elk Timber Company in Canada some years ago. I started talking to him about the deal and he expressed a desire to know more about it. He is a man of very large interests and was in a position to put up a good deal of cash. I then reinstituted negotiations with Coleman and ‘low and behold’ we made a deal.

“The way the lumber market has been behaving recently, I am not too sure we couldn't have made a mistake; however, time will tell.

“If we can ever be of service to your good company just let me know and I will put the sales-manager down there on your trail.

“With best personal regards,

“Very truly yours,

/s/ Harry

“Harry J. O’Donnell”

This letter was hurriedly written without the counsel of anyone, and it was not intended to be, nor was it misleading to Joseph (O’Donnell, R. 1899-1909; Joseph, R. 475-7, 639-41; Exhibits 94 and 96).

(4) Joseph did not answer O’Donnell’s letter of September 22, 1953 (Joseph, R. 640; Admitted Fact XXVI, R. 160); nor did he thereafter communicate or attempt to communicate with O’Donnell with respect to Kinzua’s purchase until May 11, 1955 when Joseph’s Seattle counsel sent their registered demand letter bearing date of May 11, 1955 reading as follows (Joseph, R. 652, 654, 661; O’Donnell, R. 1995; Exhibit 117):

“Registered Mail

“Return Receipt Requested

“Mr. Harry J. O’Donnell

Skinner Building

Seattle 1, Washington

“Dear Mr. O’Donnell:

“Our office, together with the firm of Pritzker, Pritzker & Clinton of Chicago, represents Mr. Harry Joseph of One North La Salle Street, Chicago, Illinois.

“According to our information, on or about October 15, 1952, Mr. Joseph submitted to you, in confidence, a proposal for the acquisition of all of the outstanding corporate stock of the Kinzua Pine companies, with the express understanding that in the event you decided to go ahead with the deal that both you and Mr. Joseph would advance fifty per

cent (50%) of the purchase price and each of you would acquire a fifty per cent (50%) interest in the stock, subject only to liability for a brokerage fee to Mr. Samuel E. Terman of Los Angeles, California.

"It is our further information that thereafter there were extensive negotiations for the acquisition of the Kinzua stock until approximately March of 1953, when you advised Mr. Joseph that you would communicate further with him when you were ready to go ahead. Mr. Joseph next heard that you had acquired the Kinzua stock without advising him or making any provision for his interest in accordance with the understanding which existed between you.

"The purpose of this communication is to formally advise you that it is the position of Mr. Harry Joseph that in acquiring the Kinzua stock you did so as trustee for his benefit to the extent of fifty per cent (50%) of all the capital stock. On behalf of Mr. Joseph, we are authorized to offer you one-half of the total cost price of the stock, and we request that you immediately furnish us with authentic evidence of the amount thereof, so that physical tender can be made to you forthwith.

"It is the further purpose of this communication to make formal demand on you to account fully for all of the earnings, accretions and increment of the Kinzua stock from the date of acquisition to the present time and to pay one-half thereof promptly to Mr. Joseph.

"Will you please respond to this communication not later than May 20, 1955.

"Very truly yours,

"Helsell, Paul, Fetterman, Todd & Hokanson

"By Thomas Todd"

(Exhibit 117)

XII.

(1) In his complaint Joseph contends that he intended to invest to the extent of 50% of the Kinzua purchase of \$12,000,000.00 (Complaint IV, R. 4-5). At the trial he testified he was representing only himself in the action (Joseph, R. 589); and both at his deposition and at the trial he testified that he had "planned" to invest \$250,000.00 in Kinzua (Joseph, R. 483, 676, 783). Prior to November 19, 1952 Joseph's largest, single investment (excluding his investment in a family corporation) was less than \$40,000.00 (Joseph, R. 677-8). During the November 19, 1952 meeting at Portland, Joseph was genuinely surprised at the amount of the \$12,000,000.00 purchase price for Kinzua announced by Coleman and Casey to Joseph, Chinn and O'Donnell (Chinn, R. 921; O'Donnell, R. 1643); and at that time Joseph, in speaking of his possible participation in Kinzua, said that at most he would be a "small minnow" in a "big sea," or words to that effect (O'Donnell, R. 1638-41; Chinn, R. 918-21).

(2) In 1952 and 1953 Joseph's net worth was approximately \$30,000.00 excluding his stock interest in the Joseph Lumber Company and valuing his real estate interest at cost (Fields, R. 1195-7, 1205-6). Joseph's assets consisted almost exclusively of undivided interests in unimproved real estate in and about Chicago and the ownership of 60 to 65% of the capital stock of the Joseph Lumber Company, a family corporation, of which he intended to retain control (Joseph, R. 701-2, 721). Joseph's cash in bank on December 31, 1952, was \$6,143.05 (Fields, R. 1194-5) and was substantially the same on December 31, 1953 (Fields, R.

1198). Joseph's life insurance was pledged to his bank to secure indebtedness approximately equally the cash surrender values of his policies (Joseph, R. 1687, 745). Joseph's liabilities during the Spring of 1953 included promissory notes payable in the amount of \$101,727.80 (Fields, R. 1197). In April, 1953 Joseph borrowed approximately \$30,000.00 from Samuel C. Horowitz to enable Joseph to participate in a real estate joint venture with Horowitz and others (Horowitz, R. 1485-7); subsequent to August 17, 1953 this loan was repaid from the proceeds of a partial liquidation of this investment (Horowitz, R. 1487).

XIII.

(1) At no time did Joseph agree, promise or offer to participate in Kinzua's purchase; nor did he represent or otherwise indicate that he would so participate. At no time did he advise or indicate the amount he might invest (Joseph, R. 555-6; O'Donnell, R. 1645-6, 1841, 1867-8, 1947-8).

(2) At no time did Joseph advise O'Donnell the names of any potential investors in Kinzua (other than Allyn); nor did he advise O'Donnell of any amount whatsoever that such investors, if any existed, might contribute to Kinzua's purchase (Joseph, R. 555-6; O'Donnell, R. 1948).

(3) At no time did Joseph or O'Donnell, either consciously or otherwise, make or assent to any offer, proposal, promise, agreement, commitment or undertaking of any kind with respect to Kinzua or otherwise; nor did either of them intend so to do. At no time did either Joseph or O'Donnell authorize or intend to au-

thorize the other to act for or on his behalf; nor did either of them assent or undertake, or intend to assent or undertake, to act on behalf of the other. Neither Joseph nor O'Donnell entrusted or placed any confidence in the other or intended so to do; and neither of them, intentionally or otherwise, acted or undertook to act with the other's interest in mind. In their conduct toward each other Joseph and O'Donnell dealt and intended to deal at arm's length with each other, and each retained and intended to retain full and unrestrained freedom of action in every respect (O'Donnell, R. 1985-6).

(4) Joseph placed no confidence in nor did he rely upon O'Donnell in any way (Joseph, R. 438-9, 441-6); on the contrary Joseph was suspicious of O'Donnell and he frequently checked upon O'Donnell's activities with Terman, Needleman and Gold, and through them with Kinzua's representatives. Joseph relayed information obtained from O'Donnell to Terman and through him to Needleman and Gold (Terman, R. 1363-4; Exhibit 43).

(5) In his relations with Joseph, O'Donnell at all times acted honestly, fairly, openly and in good faith. At no time did O'Donnell intentionally or otherwise, make any false or misleading statements to Joseph; nor did O'Donnell ever, intentionally or otherwise, misrepresent any fact or thing to Joseph or conceal any fact or thing from him. At no time did O'Donnell, intentionally or otherwise, mislead or deceive Joseph in any way, and Joseph, in fact, was never misled or deceived by O'Donnell in any respect (O'Donnell, R. 1985-6).

(6) All information and data which O'Donnell and the other defendants used in determining the desirability and feasibility of acquiring Kinzua or in negotiating for its acquisition were obtained solely and exclusively by O'Donnell and the other defendants by their own efforts and at their own expense, and Joseph, in fact, had no such information or data, except that originally provided him by Terman. At no time did plaintiff share or offer to share the expenses incident to the negotiations for Kinzua's purchase and to the inspection and investigation of its properties (Joseph, R. 611-12).

(7) If Joseph ever had any interest in Kinzua's purchase with O'Donnell it was known and understood at or about the end of March, 1953 by Joseph and O'Donnell that such interest was terminated and that at the very least O'Donnell believed and had the right to believe that it was (O'Donnell, R. 1811, 1841, 1867-8, 1947-8). Joseph was generally familiar with conditions, including price trends, in the lumber industry and was aware during the Winter, Spring and Summer of 1953 that the lumber industry was in a depressed condition (Exhibit 46; Joseph, R. 657-9). Lumber prices in fact were declining during the year 1953 (O'Donnell, R. 1993-4).

XIV.

Joseph was told by O'Donnell, on December 19, 1952, or Joseph had otherwise learned, that the purchase and ownership of Kinzua would require the purchasers to make the following-described changes of position:

(a) Pay, or incur the obligation to pay, a minimum purchase price of \$12,000,000.00 (Joseph, R. 378);

(b) Incur the risk of depressed market conditions and deflated prices for timber and lumber (Joseph, R. 657-9; O'Donnell, R. 1993-4);

(c) Incur the risk of bug infestation in timberlands with known propensity therefor (O'Donnell, R. 1770-1);

(d) Incur the risk of loss or damage to timberlands and/or mill and townsite from fire (O'Donnell, R. 1984);

(e) Double the production of mill to facilitate the servicing of the deferred purchase price, which would lead to the additional changes of position and problems following (Joseph, R. 655-6):

(1) Expenditures of \$250,000.00 or more, for additional dry kiln facilities (Joseph, R. 435-6, 654-5);

(2) Expenditures for new chipper and additional logging equipment (Joseph, R. 435-6);

(3) Expenditures for additional housing and for other facilities for increased number of personnel to handle increased production (O'Donnell, R. 1786);

(4) Shutting down of factory operation (O'Donnell, R. 1786);

(5) Transfer to new jobs or discharge of factory employees and surplus employees in other departments of Kinzua operations with possible resulting labor trouble (Joseph, R. 435);

(6) Employment of new personnel to facilitate double-shift operation, including the problems of

inducing qualified personnel to move to remote place such as Kinzua (O'Donnell, R. 1785, 1790-1).

(f) Incur the risks attendant upon dissolution of corporations, distribution of assets and assumption of liabilities, reorganization of operation and installation of new management (Joseph, R. 407-8).

XV.

O'Donnell, and the other defendants, incurred the following-described changes of position commencing with their purchase of Kinzua on August 17, 1953 and prior to May 11, 1955, the date of the registered letter addressed to O'Donnell by Joseph's attorneys, in which they asserted a right in Joseph to acquire 50% of Kinzua:

(a) Paid, or incurred the obligation to pay, a minimum purchase price of \$12,250,000.00. Each of the purchasers of Kinzua capital stock was required to execute a promissory note which rendered him jointly and severally liable for the unpaid portion of the purchase price, to-wit, \$8,820,000.00, limited, however, to the recapture of the Kinzua property (Exhibit 114);

(b) Incurred the risk of fluctuating market prices for timber and lumber. The lumber market in fact continued to decline and dropped off following defendants' purchase of Kinzua. It started rising again in 1954 and by 1955 prices were materially higher (O'Donnell, R. 1993-4).

(c) Incurred the risk of bug infestation and its spread. Defendants employed contract loggers who worked for two years "sanitizing" Kinzua virgin timber "by taking out the trees that were in trouble or

would cause trouble to other trees'' (O'Donnell, R. 1984-5).

(d) Incurred the risk of loss or damage to timberlands and/or mill and townsite from fire (O'Donnell, R. 1984). Defendants built roads into areas that had not previously been accessible for fire prevention and fire-fighting purposes. The sawmill sprinkling system was also improved to give greater protection to the mill and townsite (O'Donnell, R. 1984).

(e) Incurred risk of liability to third parties for fire damage arising out of spread of fire starting on Kinzua lands to neighboring lands (O'Donnell, R. 1984).

(f) Doubled the annual production of Kinzua from approximately 30,000,000 feet to approximately 60,000,000 feet (O'Donnell, R. 1918). Had Kinzua's production been continued at the same rate as that preceding its purchase, the operation would not have been sufficiently profitable to service the annual payments which the defendants were required to pay the sellers of the Kinzua capital stock as required by the Stock Purchase Agreement of August 17, 1953 (O'Donnell, R. 1983). The following-described additions, changes and improvements costing defendants approximately \$800,000.00 were made during the period commencing August 17, 1953 to the time Joseph's suit was commenced, to secure such increased production (O'Donnell, R. 1920):

(1) Additional dry kiln facilities were constructed (O'Donnell, R. 1982);

(2) Barking and chipping equipment was acquired and installed (O'Donnell, R. 1983);

(3) Twenty new houses were constructed for additional employees (O'Donnell, R. 1982), school-house in Kinzua was enlarged (O'Donnell, R. 1983) and additional miscellaneous facilities were constructed or expanded in the town site (O'Donnell, R. 1983);

(4) Log pond was enlarged (O'Donnell, R. 1983);

(5) Factory inventory was liquidated and factory shut down (O'Donnell, R. 1982);

(6) Additional lumber storage sheds were constructed (O'Donnell, R. 1982-3);

(7) Flow of lumber arrangements on the floor of the mill were revised (O'Donnell, R. 1982);

(8) Additional logging equipment was purchased (O'Donnell, R. 1983-4).

(g) Incurred the risks attendant upon the shutting down of the factory and other reorganization measures resulted in the reassignment of certain personnel and the discharge of others. The doubling of production necessitated the employment of substantial numbers of additional men for the logging crew and the sawmill crew. Labor unrest and related problems accompanied these personnel changes (O'Donnell, R. 1785-6, 1790-1, 1981-4).

(h) Incurred the risks attendant upon the dissolution of the Kinzua corporations, distribution of assets, reorganization of operation and new management (O'Donnell, R. 1918-19).

(i) O'Donnell and others purchasing Kinzua devoted their skill, time and efforts to the operations, reorganization, improvements and matters heretofore re-

ferred to under this Paragraph XV. Joseph was well aware that such time, skill and efforts were required and were being devoted to the matters mentioned (Joseph, R. 407).

XVI.

Joseph was aware that the prices for lumber products, and the value of stumpage fluctuates considerably from time to time (Joseph, R. 657). He was aware that prices were materially higher in 1954 and 1955 than in 1953, and Joseph believed that as of May, 1955 the Kinzua investment had been highly successful (Joseph, R. 659).

CONCLUSIONS OF LAW

I.

The oral memorandum decision of the court rendered in this cause on January 18, 1957 and appearing in the record herein at pages 2126 to 2147, inclusive, of the transcript, is by this reference incorporated into and made a part of these conclusions of law to the same effect as if such decision were fully set forth herein. All conclusions of law expressed by the Court in such memorandum decision are hereby expressly adopted and incorporated herein by this reference as if fully set forth in this paragraph.

II.

The law of the State of Oregon governs any alleged relationship between the plaintiff and the defendant, the creation and termination of any such relationship, and the statute of frauds regarding any claim arising out of any such relationship. The law of the State of

Washington applies with respect of any defense of laches interposed to any such claim.

III.

Plaintiff and defendant O'Donnell had no joint venture, agency, contractual, confidential, fiduciary or any other legal relationship with each other.

IV.

Plaintiff and defendant O'Donnell at all times dealt at arm's length with each other, and each of them was legally free to act solely in his own interests to the exclusion of the other and without any legal obligation to the other.

V.

Defendant O'Donnell did not mislead, deceive or defraud Joseph in any way; nor was plaintiff ever in any way misled, deceived or defrauded by defendant O'Donnell.

VI.

Defendant O'Donnell was not unjustly enriched either at plaintiff's expense or otherwise.

VII.

If any relationship ever existed between defendant O'Donnell and plaintiff, such relationship had terminated prior to August 17, 1953.

VIII.

If any relationship ever existed between plaintiff and defendant O'Donnell, it was known and understood by them that such relationship was terminated by March 31, 1953; and by reason of plaintiff's actions and inaction, defendant O'Donnell at the very least had reason to believe and did believe that such relationship, if any,

ceased to exist. Plaintiff is estopped to assert any claim against defendant O'Donnell or against any other defendant.

IX.

Plaintiff speculatively delayed asserting any claim against defendant O'Donnell or any of the other defendants during the period of the greatest hazard to defendants' investment and until the success thereof appeared to him to be certain. Plaintiff is barred by laches and he is estopped from asserting any claim against defendant O'Donnell or any other defendant.

X.

The claims which plaintiff asserts against the defendants other than O'Donnell are based as a matter of fact and law upon plaintiff's claim of liability against defendant O'Donnell. Since plaintiff has no lawful claim against defendant O'Donnell, the defendants other than O'Donnell are not liable to plaintiff and he has no valid or lawful claim against any of them.

XI.

Plaintiff's cause of action against the defendants and each of them should be dismissed on the merits with prejudice and with costs.

